(2)

Supreme Court, U.S.
FILED
NOV 1 2 2004
OFFICE OF THE CLERK

NO. 03-9685

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JOHNSON, Jr.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

---

AMICUS CURIAE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAYWERS IN SUPPORT OF PETITIONER

Michael Kennedy McIntyre
507 The Grant Building
44 Broad Street, NW
Atlanta, Georgia 30303
(404) 688-2000
Ga. State Bar No. 494075

Donald F. Samuel
Counsel of Record
Garland, Samuel & Loeb, P.C.
3151 Maple Drive, NE
Atlanta, Georgia 30305
(404)-262-2225
Ga. State Bar. No. 624475

QUESTION PRESENTED

WHEN A STATE COURT VACATES AS UNCONSTITUIONAL A PRIOR STATE CONVICTION THAT HAD BEEN USED TO ENHANCE A FEDERAL SENTENCE, IS THE VACATUR OF THAT CONVICTION A "FACT SUPPORTING THE CLAIM" STARTING THE ONE-YEAR STATUTE OF LIMITATIONS UNDER 28 U.S.C. § 2255(4)?

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....4

A. WHEN A STATE COURT CONVICTION IS USEDTO ENHANCE A FEDERAL SENTENCE, THE ONE YEAR STATUTE OF LIMITATONS OF 28 U.S.C. §2255 SHOULD BE INTERPRETED TO COMMENCE WHEN THE STATE COURT CONVICTION IS CONCLUSIVELY INVALIDATED.....4

B. UNITED STATES SUPREME COURT PRECEDENT HAS INVITED DEFENDANTS TO CHALLENCE THEIR ENHANCED FEDERAL SENTENCES BY MAKING A SUCCESSFUL CHALLENGE TO THE PRIOR STATE CONVICTION IN A COLLATERAL PROCEEDING AND THEN BY FILING A §2255 MOTION TO CORRECT THE ENHANCED SENTENCE.....5

C. THE DECISIONS IN *JOHNSON* AND *BRACKETT* PUNISH DEFENDANTS WHO HAVE REASONABLE RELIED ON THE PROCEDURE OUTLINE IN *CUSTIS* AND *DANIELS*.....6

D. UNLESS THE COURT REVERSES THE LOWER COURT, FEDERAL PRISONERS WILL RECEIVE ENHANCED SENTENCES, EVEN LIFE SENTENCES, BASED ON PRAIOR STATE CONVICTIONS WHICH THEY DID NOT COMMIT OR WHICH WERE UNCONSTITUTIONALLY OBTAINED.....11

E. THE INTERPRETATION OF 28 U.S.C. §2255 ¶6(4) IN *BRACKETT AND JOHNSON*, IF ALLOWED TO STAND, WILL CUAE THOUSANDS OF MERITLESS §2255 MOTIONS TO DELUGE FEDERAL COURTS.....12

CONCLUSION.....14

TABLE OF AUTHORITIES

Page

CASES

Brackett v. United States, 270 F.3d 60 (1st Cir. 2001)..... 3,9,10,12

Brackett v. United States, 206 F.Supp.2d 183 (D. Mass.2002)..... 12

Capote v. Ray, 276 Ga. 1, 577 S.E.2d 755 (2002). 10

Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994)... 5, 7

Daniels v. United States, 532 U.S. 374, 121 S. Ct. 1578, 149 L.Ed.2d 590 (2001)..... 5, 7

Duran v. United States, 2002 WL 867864 (S.D.N.Y. 2002)..... 11

Johnson v. United States, 340 F.3d 1219 (11th Cir. 2003)..... 3, 4, 9 11, 12

Moss v. States, 255 Ga. App. 107, 564 S.E. 2d 516 (2002)..... 10

Parris v. State, 232 Ga. 687, 208 S.E.2d 493 (1974)..... 10

United States v. Cavallaro, 2000 WL 230225 (D.Me. 2000)..... 8, 11

United States v. Hicks, 286 F. Supp.2d 768 (E.D. La. 2003)..... 11

United States v. Hoskie, 144 F. Supp.2d 108 (D. Conn. 2001)..... 11

United States v. Payne, 894 F. Supp. 534 (D. Mass. 1995)..... 10

STATUTES

28 USC §2255..... 3,4,5,6

28 USC §2255 ¶6..... 3,7

28 USC §2255 ¶6(4)..... 3,4,7,8,9 11,12,13

INTEREST OF THE AMICUS CURIAE[1]

This amicus brief is written by the Georgia Association of Criminal Defense Lawyers (hereinafter GACDL) which is a non-profit corporation organized in 1974 and by the National Association of Criminal Defense Lawyers (hereinafter NACDL) which is a District of Columbia non-profit corporation.

GACDL has a membership that is comprised of more than fifteen hundred (1,500) attorneys licensed to practice law in the State of Georgia. GACDL is the only Georgia association of public and private defense lawyers. The association is dedicated to the preservation and improvement of our adversary system of justice, and a reasoned and informed advancement of criminal procedure and jurisprudence. The affiliates and leadership of the association believe GACDL represents the concerns and interest of those lawyers who undertake the responsibility of defending citizens accused of crimes in the State of Georgia.

Article II of the by-laws of the GACDL defines the purposes of the association. Subsection (a) expresses the association's commitment to the defense of fundamental civil liberties assured by the state and federal Constitutions, in addition to the association's concern with the fair and impartial administration of criminal justice. It confirms the association is devoted "[t]o protect and insure by rule of law, those individual rights guaranteed by the Georgia and Federal Constitutions in criminal cases; to resist the efforts which are constantly being made to curtail such rights; to

---

[1] The Parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court. This brief was not written in whole or in part by counsel for a party. Amici and their counsel were not compensated in any way.

encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice in the common good."

The amicus curiae committee of GACDL is a standing committee which submits amicus briefs in state and federal appellate courts on issues deemed to be of significance to defense lawyers throughout the State of Georgia. The amicus curiae committee requested and authorized the undersigned to file this brief.

The NACDL was founded over 40 years ago and now has a membership including more than 10,000 attorneys with members in every state. NACDL has some 80 state and local affiliates which permit it to speak on behalf of over 30,000 professional defenders. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar. NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the availability of effective judicial remedies, including appellate review, for those our system has failed, and for whom collateral review thus provides the only avenue for seeking justice.

The NACDL national amicus curiae committee requested and authorized the undersigned to file this brief.

SUMMARY OF THE ARGUMENT

Petitioner filed a Petition for Writ of Certiorari, challenging the lower court's determination that his 28 U.S.C. § 2255 motion was time-barred. Specifically, Petitioner was convicted of a federal drug conspiracy offense, and his sentence, which was imposed in 1994, was enhanced based on prior state convictions. Subsequently, Petitioner successfully challenged his prior state convictions and then filed A Section 2255 motion to have his enhanced sentence corrected to reflect the vacatur. The vacatur of the state court convictions occurred on October 24, 2000.

The government argued that the vacatur[2] was not a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4); thus, Petitioner was time-barred by the one year statute of limitations. On August 5, 2003, in a divided panel decision, the Eleventh Circuit affirmed the denial of Petitioner Johnson's Section 2255 action as being untimely, reasoning that it was not brought within one year "of the date on which the facts supporting the claim or claims presented could have been discovered . . ." *Johnson v. United States*, 340 F.3d 1219, 1226 (11th Cir. 2003) (citation omitted).

The two other Circuits to have addressed this issue are hopelessly split. In *United States v. Gadsen*, 332 F.3d 224 (4th Cir. 2003), the Fourth Circuit held that the setting aside of a prior conviction is a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4). In *Brackett v. United States*, 270 F.3d 60 (1st Cir. 2001), however, the First Circuit held that the setting aside of a prior conviction is not a "fact" within the meaning of 28 U.S.C. § 2255 ¶6(4).

Amici submits that the language and spirit of the limitations statute dictate a result in accordance with *Gadsen*, *supra*. In pertinent part, 28 U.S.C. § 2255 ¶6 prescribes that

---

[2] Vacatur, meaning the setting aside of the prior conviction.

the one year limitations period begins from the latest of, "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." It is the "fact" of the vacatur which gives a federal inmate the legal legs to challenge the enhanced federal sentence. This construction is also consistent with existing Supreme Court precedent; provides defendants with the remedy which the Supreme Court has promised; honors the most basic tenets of fairness; and prevents the filing of premature and meritless Section 2255 motions.

ARGUMENT

A. WHEN A STATE COURT CONVICTION IS USED TO ENHANCE A FEDERAL SENTENCE, THE ONE YEAR STATUTE OF LIMITATIONS OF 28 U.S.C. §2255 SHOULD BE INTERPRETED TO COMMENCE WHEN THE STATE COURT CONVICTION IS CONCLUSIVELY INVALIDATED.

In *Johnson v. United States*, 340 F.3d 1219 (11th Cir. 2003), the Eleventh Circuit affirmed the lower court's determination that Petitioner Johnson's Section 2255 action was time-barred. Amicus Curiae respectfully requests that the Court reverse the judgment of the Eleventh Circuit and to rule in favor of Petitioner for the following reasons:

(1) Such a ruling is consistent with precedent of the United States Supreme Court and the language of 28 U.S.C. §2255 ¶6(4);

(2) Such a ruling would provide those defendants, who reasonably relied on Supreme Court precedent, with the promised remedy;

(3) Such a ruling furthers the ends of justice by preventing defendants from serving substantially increased sentences based upon invalid state convictions; and

(4) Such a ruling would prevent the premature filing of meritless 2255 motions.

B. UNITED STATES SUPREME COURT PRECEDENT HAS INVITED DEFENDANTS TO CHALLENGE THEIR ENHANCED FEDERAL SENTENCES BY MAKING A SUCCESSFUL CHALLENGE TO THE PRIOR STATE CONVICTION IN A COLLATERAL PROCEEDING AND THEN BY FILING A §2255 MOTION TO CORRECT THE ENHANCED SENTENCE.

In *Custis v. United States*, 511 U.S. 485, 497, 114 S. Ct. 1732, 128 L.Ed..2d 517 (1994), the Court held that federal defendants could not attack the validity of prior convictions used to enhance their federal sentences at the federal sentencing proceeding. The Court in *Custis* directed defendants to attack their prior convictions in separate proceedings and, if successful, to "then apply for reopening of any federal sentence enhanced by the state sentences." *Id.* at 497.

Recently and since the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Court in *Daniels v. United States*, 532 U.S. 374, 121 S. Ct. 1578, 149 L.Ed.2d 590 (2001), held that a federal prisoner may not challenge a federal sentence through a Section 2255 action on the ground that a prior state conviction was unconstitutionally obtained. Instead, the Court reasoned that the defendant should "pursue any

channels of direct or collateral review still available to challenge his prior conviction" and "[i]f any such challenge to the underlying conviction is successful, the defendant may then apply for reopening of his federal sentence." *Id.* at 382.

The collective instruction of *Custis* and *Daniels* is that federal defendants may not challenge in the federal sentencing proceeding the validity of their prior state convictions used to enhance their federal sentences; after sentencing, they may challenge the validity of their prior state conviction in a collateral proceeding; and if successful, they may initiate a Section 2255 action to correct their enhanced federal sentence. Notably, *Custis* and *Daniels* did not place any time constraints upon this procedure. Accordingly, the only reasonable reading of *Custis* and *Daniels* is that a federal prisoner, who avails himself of the Court's invitation to challenge a prior state conviction, is not thereafter barred merely because the challenge was not completed within one year of the federal sentencing.

C. THE DECISIONS IN *JOHNSON* AND *BRACKETT* PUNISH DEFENDANTS WHO HAVE REASONABLY RELIED ON THE PROCEDURE OUTLINED IN *CUSTIS* AND *DANIELS*.

As discussed above, Supreme Court precedent holds that federal defendants may not challenge their prior state conviction being used to enhance their sentence, at their federal sentencing. Instead, the Court instructs defendants to make these challenges in separate proceedings after sentencing and, if successful, to file a Section 2255 motion to vacate, set aside, or correct sentence. To date, the Court has not imposed a time constraint on this procedure.

Under 28 U.S.C. §2255, a prisoner in custody under sentence of a federal court may petition the court that

imposed the sentence to vacate, set aside or correct the sentence subject to a one-year period of limitations, which runs from the latest of:

> (1) The date on which the judgment of conviction becomes final;
>
> (2) The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) The date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4) The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.**

28 U.S.C. §2255 ¶6 (emphasis added).

The only construction of 28 U.S.C. §2255 ¶6(4) that is consistent with the Supreme Court precedent of *Custis* and *Daniels* is the interpretation outlined by the United States Court of Appeals for the Fourth Circuit in *United States v. Gadsen*, 332 F.3d 224 (2003). In *Gadsen*, the Fourth Circuit held that:

> The plain text of §2255 and the logic of the Supreme Court's opinion in Daniels point to the same conclusion: in cases like

> Gadsen's, the federal statute of limitations begins running when the state court conviction is conclusively invalidated.

Id. at 228-229.

To hold that the one year statute of limitations begins before the state conviction is conclusively invalidated would contravene the Supreme Court's rulings in *Custis* and *Daniels*. Although a defendant has control over when to initiate the challenge in state court, the defendant has no control over the court's subsequent actions in resolving the matter. The state court could take over one year to invalidate the defendant's prior state conviction and any appeal of that ruling would almost certainly exceed the one year period.

The Fourth Circuit in *Gadsen*, *supra* correctly allocated control over the one year limitations period to the defendant by holding that the one year period commences when the state court conviction is conclusively invalidated. Any other result would subjugate defendants' rights as outlined in *Custis* and *Daniels* to the vagaries of a time-line entirely beyond their control.

The court in *United States v. Cavallaro*, 2000 WL 230225 (D. Me. 2000), provided a logical framework to explain 28 U.S.C. §2255 ¶6(4). The "claim" is the claim that the defendant is not a career offender. *Id.* The "fact" supporting this claim is the fact that the prior state conviction, once used to support the assertion that the defendant was a career offender, no longer exists. *Id.* This "fact" was not "discoverable" until the date that the state conviction was conclusively invalidated. *Id.*

In contrast, the United States Court of Appeals for the First Circuit and Eleventh Circuit offer a starker

interpretation of 28 U.S.C. §2255 ¶6 (4). Particularly, in *Brackett*, the First Circuit held:

> We hold that the operative date under §2255(4) [sic] is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction.

Brackett v. United States, 270 F.3d at 68. Similarly, in *Johnson*, the Court held:

> Because an indirect collateral attack is predicated on a successful challenge to prior state convictions used to enhance the federal sentence, it is at least plausible to argue that a petitioner has one year from the date his prior state convictions were set aside, under §2255 ¶6 (4).
>
> Common sense, however, dictates that we distinguish legal propositions and results from the "facts" referred to in §2255.

Johnson v. United States, 340 F.3d at 1233. The *Johnson* Court went further, characterizing the vacatur of a prior state conviction as a "court action" and not a "fact" that is "discoverable." *Id.*

But the apparent logic behind *Johnson* and *Brackett* utterly evades those defendants who relied on *Custis* and *Daniels*. Even the *Brackett* Court acknowledged the predicament now facing such defendants:

> ...the net result of Custis and Daniels was to leave federal prisoners in a practical bind. They could not bring a §2255 petition to federal court until they had gotten the state convictions vacated and they had only one year in which to accomplish that from the date of federal conviction - - a daunting task.

Brackett v. United States, 270 F.3d at 67. "It would be an illogical, if not cruel, gesture for the Supreme Court to invite prisoners to attack their predicate convictions and then inform them that their efforts must go for naught and their enhanced sentences must stand." *United States v. Payne*, 894 F. Supp. 534, 543 (D. Mass. 1995). To avoid a miscarriage of jurisprudence and justice, the Court should grant Certiorari and protect those defendants who have reasonably relied upon the procedure set forth by the United States Supreme Court.

Moreover, it is no answer that the defendant should have initiated his collateral attack on the state court conviction earlier. In Georgia, for example, the defendant could not initiate his state habeas petition until he was laboring under a new federal sentence that was increased based on his prior state conviction. There simply would have been no jurisdiction to challenge an older (already-served) state conviction until its effect is again realized: that is, the conviction is causing a longer sentence in federal court. *See Capote v. Ray*, 276 Ga. 1, 577 S.E.2d 755 (2002); *Moss v. State*, 255 Ga. App. 107, 564 S.E.2d 516 (2002); *Parris v. State*, 232 Ga. 687, 208 S.E.2d 493 (1974). Thus, Johnson pursued his state collateral challenge in a

timely manner – as soon as he had jurisdiction in state court, based on the enhanced federal sentence.[3]

D. UNLESS THE COURT REVERSES THE LOWER COURT, FEDERAL PRISONERS WILL RECEIVE ENHANCED SENTENCES, EVEN LIFE SENTENCES, BASED ON PRIOR STATE CONVICTIONS WHICH THEY DID NOT COMMIT OR WHICH WERE UNCONSTITUTIONALLY OBTAINED.

Other courts have rejected the interpretation of 28 U.S.C. §2255 ¶6(4) as enunciated by the First and Eleventh Circuit and, instead, followed the interpretation announced in *United States v. Gadsen, supra. See United States v. Hicks*, 286 F. Supp.2d. 768 (E.D. La. 2003); *Duran v. United States*, 2002 WL 867864 (S.D.N.Y 2002); *United States v. Hoskie*, 144 F. Supp.2d 108 (D. Conn. 2001); *United States v. Cavallaro*, 2000 WL 230225 (D. Me. 2000). In doing so, these courts have avoided a regime in which federal prisoners serve substantially longer sentences, even life sentences, based on a prior state conviction that was subsequently vacated. As Judge Roney stated in his dissent in *Johnson, supra:*

> Without question, if the rule announced in this decision and in Brackett is consistently applied, in some circuits there will be defendants serving time in federal prison under a federal sentence based upon conviction of a state crime that the state court

[3] It should be noted that in 2004, the Georgia Legislature amended the state habeas statute, and implemented a four-year statute of limitations for challenging a felony conviction. O.C.G.A. § 9-14-42. Johnson, however, filed his state habeas action in a timely manner under then-existing state law.

> has authoritatively held the defendant unquestionably did not commit, who would be barred from relief, while in other circuits relief from such imprisonment will be readily available.

This inequity should not be reduced to law; and the Court can provide the needed relief by reversing the decision of the Eleventh Circuit in this case.

E. THE INTERPRETATION OF 28 U.S.C. §2255 ¶6(4) IN *BRACKETT* AND *JOHNSON*, IF ALLOWED TO STAND, WILL CAUSE THOUSANDS OF MERITLESS SECTION 2255 MOTIONS TO DELUGE FEDERAL COURTS.

Human cost aside, the decisions in *Johnson* and *Brackett*, if allowed to stand, will cause a deluge of meritless § 2255 motions undoubtedly generating unnecessary work for clerks, judges and their support staff, and federal prosecutors. The reason is simple: To comply with the one year limitations period, federal prisoners will have to file Section 2255 motions while the collateral attacks on their prior state convictions are still pending. For federal practitioners, prudence and the fear of ineffective claims would require erring on the side of filing such a motion promptly after sentencing. Predicting these problems, the district court in *Brackett v. United States*, 206 F.Supp.2d 183, 186 (D. Mass. 2002), explained:

> Thus, rather than have failure in the state court act as a natural screen, the courts' approach results in thousands of meritless petitions being filed--each of which requires a case file be opened, orders issued, papers docketed, and the file stored. ... The net result

> is that the burden on the courts imposed by habeas corpus petitions is likely to increase, not decrease, as the courts continue to wrestle with AEDPA.

To prevent an unnecessary burden to the federal judiciary, the Court should adopt the Fourth Circuit's interpretation of 28 U.S.C. §2255 ¶6(4).

CONCLUSION

Amicus Curiae respectfully request the Court to reverse the decision of the Eleventh Circuit. The issue presented here is critically important to an unknown number of federal inmates, to any number of future defendants, to all federal practitioners, and to the federal judicial system itself.

Respectfully submitted,

Michael Kennedy McIntyre
Georgia Bar No. 494075
507 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-0900

Donald F. Samuel
Georgia Bar No. 624475
Garland, Samuel & Loeb, P.C.
3151 Maple Drive, NE
Atlanta, Georgia 30305
(404) 262-2225